

15SL-CC00542

Electronically Filed - St Louis County - February 13, 2015 - 04:17 PM

**IN THE MISSOURI CIRCUIT COURT
FOR THE TWENTY-FIRST JUDICIAL CIRCUIT
COUNTY OF ST. LOUIS**

**SUZANNE DEGNEN, D.M.D., P.C.
d/b/a SUNSET TOWER FAMILY
DENTISTRY,**

**Plaintiff,
v.**

**FREE CONTINUING EDUCATION
ASSOCIATION, LLC d/b/a FCEA,**

Serve:

**Christopher Anderson
Registered Agent**

**13997 S. Minuteman Dr., #140
Draper, UT 84020**

or

Michael K. McHenry, COO

**9067 South 1300 West
Suite 301**

West Jordan, Utah 84088

**MICHAEL KEITH MCHENRY,
individually and d/b/a FCEA,**

Serve:

**9067 South 1300 West
Suite 301**

West Jordan, Utah 84088

or

**534 E. Tilden Parc Lane
Unit 605**

Draper, UT 84020

**DANIEL NAVA, individually
and d/b/a FCEA,**

Serve at POE:

**9067 South 1300 West
Suite 301**

West Jordan, Utah 84088

and

**JOHN DOES 1-10,
Defendants.**

Case No.

Division:

JURY TRIAL DEMANDED

CLASS ACTION JUNK-FAX PETITION

Plaintiff Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry brings this junk-fax class action, on behalf of itself and all others similarly situated, against Defendant Free Continuing Education Association, LLC d/b/a FCEA, Defendant Michael Keith McHenry, individually and d/b/a FCEA, Defendant Daniel Nava, individually and d/b/a FCEA, and Defendants John Does 1-10.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry is a Missouri corporation with its principal place of business in St. Louis County, Missouri.

2. Defendant Free Continuing Education Association, LLC d/b/a FCEA is a Utah limited liability company with its principal place of business in West Jordan, Utah.

3. A true copy of Defendant Free Continuing Education Association LLC's Articles of Dissolution filed on August 29, 2014, with the State of Utah, Department of Commerce, Division of Corporations & Commercial Code (Utah DCCC), is attached as **Exhibit 1**.

4. Defendant Free Continuing Education Association, LLC, is a continuation of "Free Continuing Education Association d/b/a FCEA," a Utah corporation that was voluntarily dissolved effective August 29, 2014.

5. A true copy of Free Continuing Education Association's Articles of

Dissolution filed with the Utah DCCC is attached as **Exhibit 2**.

6. Defendant Michael Keith McHenry, individually and d/b/a FCEA, is an individual who resides in Utah.

7. Defendant Daniel Nava, individually and d/b/a FCEA, is an individual who, on information and belief, resides in Utah.

8. John Does 1-10 are not presently known and will be identified through discovery.

9. This Court has personal jurisdiction over Defendants under 47 U.S.C. § 227(b)(3), because Defendants sent at least one illegal fax into Missouri, Defendants transact business within this state, Defendants have made contracts within this state, Defendants have committed tortious acts within this state, and/or Defendants otherwise have sufficient minimum contacts with this state.

10. Venue is proper under the TCPA and/or under Missouri Revised Statutes § 508.010.2(4).

THE FAXES

11. On or about June 3, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 3** (First Fax).

12. On or about June 9, 2014, Defendants used a telephone facsimile machine, computer, or other device to send to Plaintiff's telephone facsimile

machine at (314) 849-1139 an unsolicited advertisement, a true and accurate copy of which is attached as **Exhibit 4** (Second Fax).

13. The First Fax and the Second Fax are hereafter collectively referred to as “the Faxes.”

14. The Faxes constitute material advertising quality or commercial availability of any property, goods, or services, including continuing education events for dentists.

15. The First Fax included nothing below McHenry’s name in the signature section, which provided:

Cheers,

ADA CERP® | Continuing Education
Recognition Program

Michael K. McHenry | President, FCEA

16. The Second Fax was not significantly better, providing:

Sincerely,
Daniel Nava – FCEA Director of Events

Fax

PHONE
888 907 6563

FAX
301 727 7209

WEB
<http://FreeDentalCE.org/stlouis>

UNSUBSCRIBE
888 907 6563

17. Neither the First Fax nor the Second Fax informed the recipient that is unlawful for the sender not to honor an opt-out request within 30 days.

18. Plaintiff received the Faxes through Plaintiff’s facsimile machine.

19. On information and belief, Defendants have sent other facsimile transmissions of material advertising the quality or commercial availability of

property, goods, or services to at least 40 other persons as part of a plan to broadcast fax advertisements, of which the Faxes are examples.

20. Defendants approved, authorized and participated in the scheme to broadcast fax advertisements by (a) directing a list to be purchased or assembled, (b) directing and supervising employees or third parties to send the faxes, (c) creating and approving the fax form to be sent; and (d) determining the number and frequency of the facsimile transmissions.

21. Defendants had a high degree of involvement in, or actual notice of, the unlawful fax broadcasting activity and failed to take steps to prevent such facsimile transmissions.

22. Defendants created or made the Faxes and other fax advertisements, which Defendants sent to Plaintiff and to other members of the "Class" as defined below.

23. The Faxes, and the other similar or identical facsimile advertisements, are part of Defendants' work or operations to market Defendants' products, goods, or services, which was sent by and on behalf of Defendants.

24. The Faxes and the other facsimile advertisements constitute material furnished in connection with Defendants' work or operations.

25. The Faxes sent to Plaintiff, and the other facsimile advertisements sent by Defendants, did not contain a proper notice that informs the recipient of the ability and means to avoid future unsolicited advertisements.

26. Defendants' similar facsimile advertisements, including the Faxes to Plaintiff, did not contain a notice stating that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under 47 C.F.R. § 64.1200(a)(4)(v) is unlawful.

27. The transmissions of facsimile advertisements, including the Faxes, to Plaintiff, did not contain a notice that complied with 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4)(iii).

28. The transmissions of facsimile advertisements, including the Faxes, to Plaintiff were required to contain a notice that complied with the provisions of 47 U.S.C. § 27(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4)(iii).

29. On information and belief, Defendants sent multiple facsimile advertisements to Plaintiff and members of the Class throughout the time period covered by the Class definition below.

30. On information and belief, Defendants faxed the same and other facsimile advertisements to the members of the Class in Missouri and throughout the United States without first obtaining the recipients' prior express permission or invitation.

31. There is no reasonable means for Plaintiff or other Class members to avoid receiving unlawful faxes but to receive lawful faxes.

32. Defendants violated the TCPA by transmitting the Faxes to Plaintiff and to the Class members without obtaining their prior express permission or

invitation and by not displaying the proper opt-out notice required by 47 C.F.R. § 64.1200(a)(4).

33. Defendants knew or should have known that (a) facsimile advertisements, including the Faxes, were advertisements, (b) Plaintiff and the other Class members had not given their prior permission or invitation to receive facsimile advertisements, (c) no established business relationship existed with Plaintiff and the other Class members, and (d) Defendants' facsimile advertisements did not display a proper opt-out notice.

34. Defendants failed to determine correctly the legal restrictions on the use of facsimile transmissions and the application of those restrictions to facsimile advertisements, including the Faxes, both to Plaintiff and the Class.

35. The transmissions of facsimile advertisements, including the Faxes, to Plaintiff and the Class caused unwanted use and destruction of their property, including toner or ink and paper, and caused undesired wear on hardware.

36. The transmissions of facsimile advertisements, including the Fax, to Plaintiff and to Class interfered with their exclusive use of their property.

37. The transmissions of facsimile advertisements, including the Faxes, to Plaintiff and the Class interfered with their business and/or personal communications and privacy interests.

CLASS ACTION ALLEGATIONS

38. Plaintiff brings this class action on behalf of the following class of persons, hereafter, the "Class":

All persons who (1) on or after four years prior to the filing of this action, (2) were sent a telephone facsimile message of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of Defendants, (3) with respect to whom Defendants cannot provide evidence of prior express permission or invitation for the sending of such faxes, (4) with whom Defendants do not have an established business relationship, or (5) which did not display a proper opt-out notice.

39. Excluded from the Class are Defendants, their employees, agents, and members of the judiciary.

40. This case is appropriate as a class action because:

a. Numerosity. On information and belief, based in part on review of the sophisticated Fax and online research as to Defendants and their marketing practices, the Class includes at least 40 persons and is so numerous that joinder of all members is impracticable.

b. Commonality. Questions of fact or law common to the Class predominate over questions affecting only individual Class members, e.g.:

- i. Whether Defendants engaged in a pattern of sending unsolicited fax advertisements;
- ii. Whether the Faxes, and other faxes transmitted by or on behalf of Defendants, contain material advertising the commercial availability of any property, goods or services;
- iii. Whether the Faxes, and other faxes transmitted by or on behalf of Defendants, contain material advertising the quality of any property, goods or services;

- iv. The manner and method Defendants used to compile or obtain the list of fax numbers to which Defendants sent the Faxes and other unsolicited faxed advertisements;
- v. Whether Defendants faxed advertisements without first obtaining the recipients' prior express permission or invitation;
- vi. Whether Defendants violated 47 U.S.C. § 227;
- vii. Whether Defendants willingly or knowingly violated 47 U.S.C. § 227;
- viii. Whether Defendants violated 47 C.F.R. § 64.1200;
- ix. Whether the Faxes, and the other fax advertisements sent by or on behalf of Defendants, displayed the proper opt-out notice required by 47 C.F.R. § 64.1200(a)(4);
- x. Whether the Court should award statutory damages;
- xi. Whether the Court should award treble damages; and
- xii. Whether the Court should enjoin Defendants from sending TCPA-violating facsimile advertisements in the future.

c. Typicality. Plaintiff's claim is typical of the other Class members' claims, because, on information and belief, the Faxes were substantially the same as the faxes sent by or on behalf of Defendants to the Class, and Plaintiff is making the same claim and seeking the same relief for itself and all Class members based on the same statute and regulation.

d. Adequacy. Plaintiff will fairly and adequately protect the interests of the other Class members. Plaintiff's counsel are experienced in class actions and TCPA claims. Neither Plaintiff nor Plaintiff's counsel has interests adverse or in conflict with the absent Class members.

e. Superiority. A class action is the superior method for adjudicating this controversy fairly and efficiently. The interest of each individual Class member in controlling the prosecution of separate claims is small and individual actions are not economically feasible.

41. The TCPA prohibits the “use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine.” 47 U.S.C. § 227(b)(1).

42. The TCPA defines “unsolicited advertisement,” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s express invitation or permission.” 47 U.S.C. § 227(a)(4).

43. The TCPA provides:

Private right of action. A person may, if otherwise permitted by the laws or rules of court of a state, bring in an appropriate court of that state:

(A) An action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) An action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) Both such actions.

47 U.S.C. § 227(b)(3)(A)-(C).

44. The TCPA also provides that that Court, in its discretion, may treble the statutory damages if a defendant “willfully or knowingly” violated Section 227(b) or the regulations prescribed thereunder.

45. “A facsimile broadcaster will be liable for violations of [Section 64.1200(a)(4)]. . . , including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual

notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.” 47 C.F.R. § 64.1200(a)(4)(vii).

46. Because the TCPA is a strict liability statute; Defendants are liable to Plaintiff and the Class even if Defendants only acted negligently.

47. Defendants’ actions caused damage to Plaintiff and the Class, as

- a. receiving Defendants’ faxed advertisements caused the recipients to lose paper and toner consumed in printing Defendants’ faxes;
- b. Defendants’ actions interfered with the recipients’ use of the recipients’ fax machines and telephone lines;
- c. Defendants’ faxes cost the recipients time, which was wasted time receiving, reviewing, and routing the unlawful faxes, and such time otherwise would have been spent on business activities; and
- d. Defendants’ faxes unlawfully interrupted the recipients’ privacy interests in being left alone.

48. Defendants intended to cause damage to Plaintiff and the Class, to violate their privacy, to interfere with the recipients’ fax machines, or to consume the recipients’ valuable time with Defendants’ advertisements; therefore, treble damages are warranted under 47 U.S.C. § 227(b)(3).

49. Defendants knew or should have known that (a) Plaintiff and the other Class members had not given express permission or invitation for Defendants or anyone else to fax advertisements about Defendants’ property, goods, or services, (b) Defendants did not have an established business

relationship with Plaintiff and the other Class members, (c) the Faxes and the other facsimile advertisements were advertisements, and (d) the Faxes and the other facsimile advertisements did not display the proper opt out notice.

50. Defendants violated the TCPA by transmitting the Faxes to Plaintiff and substantially similar facsimile advertisements to the other Class members without obtaining their prior express permission or invitation and by not displaying the proper opt-out notice required by 47 C.F.R. § 64.1200(a)(4)(iii).

WHEREFORE, Plaintiff Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry, individually and on behalf of all others similarly situated, demands judgment in its favor and against all Defendants, jointly and severally, as follows:

- a. certify this action as a class action and appoint Plaintiff as Class representative;
- b. appoint the undersigned counsel as Class counsel;
- c. award damages of \$500 per facsimile pursuant to 47 U.S.C. § 227(a)(3)(B);
- d. award treble damages up to \$1,500 per facsimile pursuant to 47 U.S.C. § 227(a)(3);
- e. enjoin Defendants and their contractors, agents, and employees from continuing to send TCPA-violating facsimiles pursuant to 47 U.S.C. § 227(a)(3)(A);
- f. award class counsel reasonable attorneys' fees and all expenses of this action and require Defendants to pay the costs and expenses of class notice and claim administration;
- g. award Plaintiff an incentive award based upon its time expended on behalf of the Class and other relevant factors;
- h. award Plaintiff prejudgment interest and costs; and
- i. grant Plaintiff all other relief deemed just and proper.

SCHULTZ & ASSOCIATES LLP

By: /s/ Ronald J. Eisenberg
Ronald J. Eisenberg, #48674
Robert Schultz, #35329
640 Cepi Drive, Suite A
Chesterfield, MO 63005-1221
(636) 537-4645
Fax: (636) 537-2599
reisenberg@sl-lawyers.com
rschultz@sl-lawyers.com

Attorneys for Plaintiff

15SL-CC00542

DocuSign

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RECEIVED

AUG 29 2014



Utah Div. of Corp. & Comm. Code

This form must be type written or computer generated



State of Utah
Department of Commerce
Division of Corporations & Commercial Code
Articles of Dissolution (After Issuance of Shares)

Entity Number: 8333107-0140

☐ Profit Corporation ☒ Nonprofit Corporation (Skip Number 4)

Pursuant to the provisions of the Utah Revised Business Corporation Act, the undersigned directors or incorporators adopt the following Articles of Dissolution.

1): Corporation Name: Free Continuing Education Association

2): The address of the Corporation's principal office or other address where service of process may be mailed

9067 South 1300 West, Ste 300

West Jordan

UT

84088

Street Address

City

State

Zip

(Utah Street Address Required, PO Boxes can be listed after the street address)

3): The date of the dissolution was authorized by the Shareholders/Members on 06/16/2014

4): The total number of votes cast for dissolution was 1000

The total number of votes cast against dissolution was 0

OR

The total number of votes cast for dissolution by each voting group was

This was sufficient for approval

Under penalties of perjury I declare that these Articles of Dissolution have been examined by me and are, to the best of my knowledge and belief, true, correct and complete.

By:

Title: Officer

Date 06/16/2014

If the filer requests a copy of the Articles of Dissolution an additional exact copy of the filed document along with a return-addressed envelope with adequate first-class postage must also be submitted

Under G.S.A. 63-2-201, all registration information maintained by the Division is classified as public record. For confidentiality purposes, you may use the business entity physical address rather than the residential or private address of any individual affiliated with the entity.

Mailing/Faxing Information: www.corporations.utah.gov/contactus.html Division's website: www.corporations.utah.gov

State of Utah
Department of Commerce
Division of Corporations and Commercial Code
I hereby certify that the foregoing has been filed
and approved on this 29th day of Aug 2014
In this office of this Division and hereby issued
This Certificate thereof

Examiner



Date

9.2.14



Kathy Berg
Kathy Berg
Division Director

Ex. 1

15SL-CC00542

DocuSign

Page 4 of 4

JBB

RECEIVED

AUG 29 2014



State of Utah
Department of Commerce
Division of Corporations & Commercial Code
Certificate of Organization (Limited Liability Company)

This form must be type written or computer generated.

Utah Div. of Corp. & Comm. Code

08-29-14 P01:17 RCVD

Important: Read instructions before completing form

Non-Refundable Processing Fee: \$70.00

1 Name of Limited Liability Company:	Free Continuing Education Association, LLC		
2 Principal office address:	9067 S 1300 W, Ste 301	West Jordan	UT 84088
3 The name of the Registered Agent (Individual or Business Entity or Commercial Registered Agent): Christopher Anderson			
The address must be listed if you have a non-commercial registered agent. See instructions for further details. Address of the Registered Agent: 13997 S Minuteman Dr. #140 City: Draper Utah Street Address Required. PO Boxes can be listed after the Street Address. State UT Zip 84020			
4 Signature of Organizer:	<i>Steven Down</i>		
5 Name and Address of Members and/or Managers (optional):	1 Steven Down	Manager	<input checked="" type="checkbox"/>
	9067 S 1300 W, Ste 301	West Jordan	UT 84088
	2 Susan Knight	Member	<input checked="" type="checkbox"/>
	9067 S 1300 W, Ste 301	West Jordan	UT 84088
6 Duration (optional):	<input checked="" type="checkbox"/> The duration of the company shall be perpetual		
	<input type="checkbox"/> The duration of the company shall be		
7 Purpose (optional):	Education Seminars		
Under URAMA (63-2-201), all registration information maintained by the Division is classified as public record. For confidentiality purposes, you may use the business entity physical address rather than the residential or private address of any individual affiliated with the entity.			
Optional Inclusion of Ownership Information: This information is not required.			
Is this a female owned business? <input type="radio"/> Yes <input checked="" type="radio"/> No			
Is this a minority owned business? <input type="radio"/> Yes <input checked="" type="radio"/> No If yes, please specify <input type="text"/> Select Type the race of the owner here			

State of Utah
Department of Commerce
Division of Corporations and Commercial Code

I hereby certify that the foregoing has been filed
And approved on this 29 day of Aug, 20 14
In the office of this Division and hereby issued
this Certificate thereof.

Examiner JAG Date 7-4-14



Kathy Berg
Kathy Berg
Division Director

Date: 08/29/2014
Receipt Number: 5701999
Amount Paid: \$122.00

9149357

Ex. 2

2014-06-03 12:35

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"Dr. David Hornbrook is that rare dentist who can do it, write about it, and teach it all with excellence! His fast paced lecture covers the gamut of esthetic, adhesive dentistry and is loaded with tips and tricks to boost any general practice. It did mine!"
 -Ron Jackson, DDS



Dr. David Hornbrook

Dear Doctor,

FCEA believes that Continuing Education should be a practice changing experience. That happens when presenters not only educate but inspire. Dr. David Hornbrook, is just that; a gifted clinician and "inspirational" instructor. He is described as not only being a wealth of knowledge but also a presenter that is entertaining and funny. Dr. Hornbrook, one of dentistry's most famous faces, will be presenting **"Restoratively Fit"**, dispelling the confusion surrounding the vast array of new materials and options available for:

- ✓ Smile Design
- ✓ Posterior Restorative
- ✓ Bridge Applications
- ✓ Full Mouth Rehabilitation

FCEA offers 6 hours of CE instruction with confidence that your practice will flourish with new patients and increased revenues. To help properly manage these revenues, FCEA is thrilled to have on hand internationally known author of "Financially Fit for Life" and "The Miracle of Wealth", Steve Down, America's wealth coach. Steve will share innovative strategies that have helped thousands of professionals thrive financially; methods that according to Mr. Down prove, "wealth is not earned...it is CREATED." Steve demonstrates how income from your practice can be converted to long term wealth.

This course instruction given by Dr. Hornbrook and Mr. Down is an event that should not be missed! Lunch Buffet included:

Fri. June 20th at the ST. Louis Union Station Double Tree Hotel

Address: 1820 Market Street St. Louis, MO 63103

Time: 9AM to 4PM

Please register early to assure your spot as seating is limited. Contact **888-907-8383** or go to <http://freedentaire.org/events/> to register. We look forward to meeting you at the event!

Cheers,

ADA CERP® | Continuing Education
Recognition Program

Michael K. McHenry | President, FCEA

Ex. 3

FCEA

From: Daniel Nava – Free Continuing Education Event Coordinator
Phone Number: 888-907-8383
Total pages including cover: 1

REGISTRATION OPEN:

Here is what people are saying about the Free Continuing Education Events:

"I thought this was going to be boring, but was really surprised!"

"Excellent choice of speaker, subject matter and Hotel"

I'm very grateful for your service."

"I applied one nugget and made money while I was still at the event"

"Very informative, great instruction, and free."

"Don't miss this event. The education and instructors are top notch. You won't regret it if you go, but you will if you don't"

We believe that continuing education should be FUN. Not boring and tiring to sit through. You need the credits, but that doesn't mean you can't get them in an exciting environment with other amazing people.

Let me just tell you a little more about the speakers:

Dr. David Hornbrook with his course "Restoratively Fit" and Steve Down, author and international speaker will be teaching the seminar.

We Can't wait to see you in **St. Louis on June 20th, 2014**. This will be the best CE event you attend this year, and your 6 CE credits are **FREE!** You only cover a small \$35 fee for your certification.

Mark your calendar now and call 888-907-8383 or go to <http://FreeDentalCE.org/st.louis> We look forward to meeting you at the event!

Sincerely,
Daniel Nava – FCEA Director of Events

Fax

PHONE
888-907-8383

FAX
501-727-1209

WEB
<http://FreeDentalCE.org/stlouis>

UNSUBSCRIBE
888-907-8383

FCEA

From: Daniel Nava – Free Continuing Education Event Coordinator
Phone Number: 888-907-8383
Total pages including cover: 1

LAST CHANCE: Registration Closing!

I know it seems like we just opened registration for **“Dentistry Rocks with Gary Takacs”** coming up on June 13th 2014 at the Newport Beach Marriott, but it's just about closing time.

This is your absolute last chance to get in, so you should get in now while you still can:

<https://freedentalce.org/newport>

Seriously, you won't find a better CE course and lunch included! You won't pay \$400 like other CE courses. You just cover a small \$35 fee for your certification.

I truly hope you're a part of it.

All the best, Daniel Nava – FCEA Director of Events

P.S. With our busy event calendar, I honestly don't know when we will be back in Newport Beach so don't miss this opportunity. Register at the link below:

<https://freedentalce.org/newport>

Fax

PHONE
888-907-8383

FAX
001 727 7209

WEB
<http://FreeDentalCE.org>

UNSUBSCRIBE
888 907 8383